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No. 713

IN THE

Supreme Court of the United States

October Term, 1958

THE SMOOT SAND & GRAVEL CORPORATION, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	9
Appendix	1a

CITATIONS

Cases:

Bass, Ratcliff & Gretton v. *State Tax Commission*, 266 U.S. 271, 69 L. Ed. 282	7
Bowling v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884	7
Butler Brothers v. *McColgan*, 315 U.S. 501, 86 L. Ed. 991	7
Eastman Kodak Company v. *District of Columbia*, 76 App. D.C. 339, 131 F. 2d 347	7
Hans Rees' Sons, Inc. v. *North Carolina*, 283 U.S. 123, 75 L. Ed. 897	6, 7
Hurd v. *Hodge*, 334 U.S. 24, 92 L. Ed. 1187	7
Lever Bros. Co. v. *District of Columbia*, 92 App. D.C. 147, 204 F. 2d 39	5
National Leather Co. v. *Massachusetts*, 277 U.S. 413, 72 L. Ed. 935	7
Panama Refining Co. v. *Ryan*, 293 U.S. 388, 79 L. Ed. 466	8, 9
Schecter v. *United States*, 295 U.S. 495, 79 L. Ed. 570	8, 9
Underwood Typewriter Co. v. *Chamberlain*, 254 U.S. 113, 65 L. Ed. 165	7
Wight v. *Davidson*, 181 U.S. 371, 45 L. Ed. 900	7

Page

STATUTES:

Constitution of the United States:

Article 1, Section 8 ..... 2, 7
Fifth Amendment 2, 7
Fourteenth Amendment 2, 7

District of Columbia Code:

Section 47-1571 3
Section 47-1580 ..... 2, 3
Section 47-1580a 2, 3
Section 47-2404 2

28 U.S.C., Section 1254 2

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The Smoot Sand & Gravel Corporation, by its counsel, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the District of Columbia Tax Court (R. 34-66) is not reported. The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix, *infra*, pp. 1a-12a.

JURISDICTION

The judgment of the Court of Appeals (Appendix, *infra*, p. 13a) was entered on November 26, 1958 and petition for rehearing by full Court was denied on December 19, 1958 (R. 231). Jurisdiction was conferred on the Court of Appeals by D.C. Code Section 47-2404. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the provisions of Sections 47-1580 and 47-1580a of the District of Columbia Code—requiring apportionment in language having a well defined meaning as explained in a long line of Supreme Court opinions and obviously following the general pattern for apportionment enacted by the States of the Union—providing that the "*measure*" of income tax imposed upon corporate income "*shall be* that portion of the net income" which is "*fairly attributable* to any trade or business carried on or engaged in within the District" and requiring that when such business is carried on both *within and without* the District the resulting income "*shall*" be deemed to constitute "income from sources within *and without* the District", can properly be construed to permit or require the District to impose tax upon all income from District sales of sand and gravel when (a) 100% of production is carried on *wholly without* the District, (b) 65% of operating costs is incurred *wholly without* the District, and (c) 50% in value of operating assets is located *wholly without* the District?

2. If the above tax imposing provisions are subject to the construction that income attributable to business carried on in Virginia and Maryland may be fully taxed by the District without apportionment, do such tax imposing provisions violate Article 1, Section 8, the Fifth Amendment, or the Fourteenth Amendment of the Constitution of the United States?

3. Does the holding of the Court of Appeals that statutory provisions requiring apportionment enacted for the

District of Columbia have an entirely different meaning in the District than such statutory terminology has to this Court and throughout the States of the Union constitute an erroneous decision on an important question of federal law?

4. Is the holding of the Court of Appeals that respondent may tax on any basis it sees fit if Congress "does not forbid it" in direct violation of the decisions of this Court holding that Congress may not abdicate and delegate its legislative functions?

STATUTES AND REGULATIONS INVOLVED

The statutes involved are Section 47-1571, Section 47-1580 and Section 47-1580a of the D.C. Code as follows:

"Title VII.—Tax on Corporations

"§ 47-1571. Taxable income defined.

"For the purposes of this title, and unless otherwise required by the context, the words 'taxable income' mean the amount of net income derived from sources within the District within the meaning of sections 47-1580 to 47-1580b.

* * * * *

"Title X.—Purpose of Article and Allocation and Apportionment.

§ 47-1580. Purpose of article.

"* * * The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District: * * *

"§ 47-1580a. Allocation and apportionment.

"The entire net income of any corporation or unincorporated business, derived from any trade or business carried on or engaged in wholly within the District shall, for the purposes of this article, be deemed to be from sources within the District, and shall, along with

other income from sources within the District, be allocated to the District. If the trade or business of any corporation or unincorporated business is carried on or engaged in both within and without the District, the net income derived therefrom shall, for the purposes of this article, be deemed to be income from sources within and without the District. Where the net income of a corporation or unincorporated business is derived from sources both within and without the District, the portion thereof subject to tax under this article shall be determined under regulation or regulations prescribed by the Commissioners. The Assessor is authorized to employ any formula or formulas provided in any regulation or regulations prescribed by the Commissioners under this article which, in his opinion, should be applied in order to properly determine the net income of any corporation or unincorporated business subject to tax under this article."

The Regulations involved are set forth in the Appendix, *infra*, 13a-18a.

STATEMENT

Petitioner is a Delaware corporation engaged in underwater mining, transportation, and sale of sand and gravel (R. 35-36).

During the years involved, 1948 through 1954, 100% of petitioner's sand and gravel was mined in Virginia and Maryland (R. 35). 65% of its operating costs was expended in Virginia and Maryland (R. 47). 50% of its assets was located in Virginia and Maryland (R. 40). Approximately 95% to 98% of its sales was in the District of Columbia (App., *infra*, 2a). The District has fully imposed its income tax on 100% of District sales without any apportionment (R. 36).

Petitioner maintains that under the terms of the tax imposing provisions of the District of Columbia Income and Franchise Tax Act of 1947 and the controlling opinions of this Court directly in point, its production costs and operating assets in Virginia and Maryland must be taken into

account as factors in the apportionment formula utilized for determining that portion of its income "fairly attributable" to the District for income tax purposes.

The District of Columbia Tax Court was of the opinion that petitioner's position was sound. However, the Tax Court was also of the opinion that its hands were tied and that it was forced to decide wrongly against petitioner under *Lever Bros. Co. v. District of Columbia,* 92 App. D.C. 147, 204 F. 2d. 39.

In the course of its opinion *the Tax Court stated* that "It is reasonable to assume that Congress intended that" a "fair and reasonable amount of the net income from" petitioner's District sales of sand and gravel "would be apportioned without and a fair and reasonable portion within the District" (R. 51). The Tax Court further pointed out that if the Supreme Court cases and the terms of the statute are followed "it must be determined that approximately one-half" of petitioner's business "was transacted within the District of Columbia and one-half without the District" (R. 64). The Tax Court continued and stated that "it is true that in this case, as in" the "Hans Rees' Sons, Inc. case formulas used attributed to the" District "'a percentage of income out of all appropriate proportion to the business transacted by the corporation' therein" (R. 64). Nevertheless, the Court felt compelled to decide wrongly against petitioner on the ground that "it must not be overlooked that the same apportionment procedure followed in this case was approved in the Lever Bros. Co., supra" (R. 64).

The Court of Appeals recognized that *this is a case of first impression in the District of Columbia* and pointed out that in *Lever Bros. Co.* v. *District of Columbia, supra,* it was not called on "to decide whether the District statute required the Commissioners' regulations to provide for apportionment of net income on the basis of sales, property values,

and operating costs, instead of exclusively on sales within the District" (App., *infra*, 4a).

In disregard of the findings and position of the Tax Court as to the soundness of petitioner's position, the Court of Appeals decided against petitioner for reasons as follows:

1. That when Congress repealed the 1939 law and enacted the present 1947 law providing for apportionment it made no change in the law because Congress failed to repeal the regulations under the 1939 law (App., *infra*, 6a).

2. That this Court's opinion by Chief Justice Hughes in *Hans Rees' Sons, Inc.* v. *North Carolina*, 283 U.S. 123, 75 L. Ed. 879, is "different" because in that case the business factors carried on in North Carolina allegedly "produced not more than 17% of the income" while the business factors carried on in Virginia and Maryland produced more than 50% of petitioner's income (App., *infra*, 11a).

3. That the District Commissioners have the same taxing powers as State Legislatures when Congress "does not forbid" such legislation by the Commissioners (App., *infra*, 9a).

4. That even though comparable statutes as enacted by the States of the Union require apportionment as requested by petitioner, "the Commissioners were of course not required to adopt what some might deem to be 'the best possible system of taxation'" (App., *infra*, 11a, footnote 9).

As pointed out by the Tax Court, respondent's administration of the 1947 law on a "coming and going" basis has created a chaotic legal jungle for taxpayers in the District of Columbia (R. 61). Respondent has taxed the Southern Railway on the basis of costs, has taxed the Evening Star Newspaper Company on the basis of operating assets and manufacturing, and has taxed petitioner on the basis of sales (R. 141-142). The seriousness of such chaotic lack of uniformity is self-evident (R. 143).

REASONS FOR GRANTING THE WRIT

1. The instant opinion of the Court of Appeals is in direct conflict with the controlling principles established by decisions of the Supreme Court. This Court has consistently held that when local income tax statutes impose tax on a fairly attributable apportionment basis with respect to a unitary business carried on in more than one jurisdiction, "all the factors in that enterprise are essential to the realization of profits" and no one of such factors may be employed to the exclusion of the others "so that the entire net income may be taxed in one state regardless of the extent to which it may be derived from the conduct of business in another state." *Hans Rees' Sons, Inc.* v. *North Carolina, supra; Butler Brothers* v. *McColgan*, 315 U.S. 501, 86 L. Ed. 991; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 65 L. Ed. 165; *Bass, Ratcliff & Gretton* v. *State Tax Commission*, 266 U.S. 271, 69 L. Ed. 282; and *National Leather Co.* v. *Massachusetts*, 277 U.S. 413, 72 L. Ed. 935.

2. The arbitrary allocation to the District of that portion of petitioner's income clearly attributable to its business carried on in Virginia and Maryland violates both the prohibition of the Fifth Amendment against the taking of property without due process of law or just compensation and of the Fourteenth Amendment against the deprivation of property without due process of law and the denial of equal protection of the laws. See *Hans Rees' Sons, Inc.* v. *North Carolina, supra; Wight* v. *Davidson*, 181 U.S. 371, 45 L. Ed. 900; *Bowling* v. *Sharpe*, 347 U.S. 497, 98 L. Ed. 884; and *Hurd* v. *Hodge*, 334 U.S. 24, 92 L. Ed. 1187.

3. Further, the imposition of tax for the District on petitioner's income clearly attributable to its business carried on in Virginia and Maryland violates Article 1, Section 8 of the Constitution which grants to Congress legislative power over the District of Columbia.

4. In *Eastman Kodak Company* v. *District of Columbia*, 76 App. D.C. 339, 131 F. 2d. 347, it was held that despite

the inequity involved the 1939 law imposed tax on the basis of sales although "from the economic point of view a large portion of the income in question is attributable to activity which took place outside the District." The Court of Appeals then went on to point out in the Eastman Kodak Company case what statutory language would be necessary to provide for apportionment on the basis of the three-factor formula of assets, operating costs, and sales. Thereupon Congress repealed the 1939 law in its entirety and enacted the 1947 law expressly providing for apportionment. Thus, the Court of Appeals told the Congress what language would be necessary to require that operating assets and manufacturing and production costs outside the District shall be taken into account and Congress explicitly adopted the language necessary to effectuate that purpose. Consequently, there can be no doubt that the opinion below has fallen into a most serious error of federal law in failing to carry out the express mandate of Congress as enacted into the 1947 law providing for apportionment.

5. The statutory provisions enacted by Congress in the 1947 law are held by this Court and throughout the States of the Union to require apportionment on such a basis that manufacturing assets and operating costs incurred outside the taxing jurisdiction are taken into account in the apportionment formula. Obviously, statutory terminology cannot properly be held to have one meaning to the Congress, to this Court, and throughout the States of the Union and an entirely different meaning in the District of Columbia (R. 120-121, 127-128, 145-163, 172-211).

6. The holding of the Court of Appeals that respondent may tax on any basis it sees fit if Congress "does not forbid it" is in direct conflict with the decisions of this Court in *Schecter* v. *United States*, 295 U.S. 495, 79 L. Ed. 570 and *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 79 L. Ed. 466. Any such abdication and delegation of the legislative functions of Congress is clearly in violation of Article 1, Section 8 of the Constitution and the decisions of this Court in

Schecter v. United States, supra, and *Panama Refining Co. v. Ryan, supra.*

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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